

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

<i>In the Matter of</i>)	
)	CG Docket No. 02-278
Petition of AEP Energy, Inc.)	CG Docket No. 05-338
Corporation For Retroactive Waiver of)	
47 C.F.R. § 64.1200(a)(4)(iv))	

**COMMENT OF WHOLESALE POINT, INC.
TO PETITION OF AEP ENERGY, INC.**

The petition for retroactive waiver filed by AEP Energy, Inc. is abusive and should be denied.

Remarkably, AEP Energy, Inc. (“AEP”) never claims that it obtained consent from plaintiff, Wholesale Point, Inc., nor any other any recipient of the junk faxes it sent. (Petition, p. 5) Plaintiff’s complaint alleges that AEP sent it an unsolicited fax advertisement on July 13, 2012. (Exhibit A of Petition, ¶ 9) In addition, Plaintiff alleges that the faxes do not contain an opt out notice in the form required by 47 U.S.C. § 227. (Exhibit A of Petition, ¶ 14) AEP has not yet filed a responsive pleading, nor asserted any affirmative defenses to plaintiff Wholesale Point, Inc.’s complaint.

In its petition, AEP fails to supply any basis for its assertions that the faxes it sent were “solicited” or that it obtained “prior express permission” from anyone, including plaintiff. There is no Declaration from AEP attached to its petition. In sum, the Petition is bereft of any facts or details to support the assertion that AEP’s faxes were sent with prior express invitation or permission.

The Commission has repeatedly held that the business claiming consent or an established business relationship has the burden of proof. "[A] sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient's prior express invitation or permission." *In re: Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; CG Docket No. 05-338, FCC Release 06-42, 21 FCC Rcd 3787, at 3812, 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006). The FCC has consistently adhered to this position. *Virtual Auto Loans*, EB-09-TC-230, 2009 FCC LEXIS 4342 (March 9, 2009); *New York Security and Private Patrol, Inc.*, EB-09-TC-231, 2009 FCC LEXIS 4343 (March 9, 2009).

Courts have also followed this rule and placed the burden of proof on the sender of the communication. *Gutierrez v. Barclays Group*, 10cv1012 DMS (BGS), 2011 U.S. Dist. LEXIS 12546, 2011 WL 579238, at *2 (S.D. Cal. Feb. 9, 2011); *Van Sweden Jewelers, Inc. v. 101 VT, Inc.*, 1:10-cv-253, 2012 WL 4074620, 2012 U.S. Dist. LEXIS 85663 (W.D.Mich., June 21, 2012); *Green v. Service Master on Location Servs. Corp.*, 07 C 4705, 2009 WL 1810769, 2009 U.S. Dist. LEXIS 53297 (N.D. Ill. June 22, 2009); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 WL 2224892, * 3-4, 2008 U.S. Dist. LEXIS 41766 (N.D. Ill. May 27, 2008) (observing that issue of consent is an affirmative defense); *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152 (N.D. Ill. 2009) (finding that consent did not exist with respect to the class because the TCPA allocates the burden of obtaining consent on the senders of unsolicited faxes, rather than requiring recipients to "opt-out"); *Lampkin v. GGH, Inc.*, 2006 OK CIV APP 131, 146 P.3d 847, ¶27 (Okla. Ct. App. 2006) (recipient should not be charged with proving the negative propositions that it did not give permission or did not have a business relationship with sender).

This is consistent with the general rule that the party claiming the benefit of an exception in a federal statute, and the party who logically would have evidence of consent or an established business relationship, has the burden of coming forward with at least some evidence of the applicability of these exceptions. *E.E.O.C. v. Chicago Club*, 86 F.3d 1423, 1429-30 (7th Cir. 1996); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 128 S. Ct. 2395, 2400, 171 L. Ed. 2d 283 (2008) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."); *Irwin v. Mascott*, 96 F. Supp. 2d 968 (N.D. Cal. 1999).

Here, AEP offers absolutely nothing to substantiate that anyone consented to receiving faxes from it.

Wholesale Point, Inc. denies giving consent to the sender of the faxes. (Affidavit of Kamal Haddad, Appendix A). The faxes seek to establish a relationship with the recipient by selling AEP's electric supply services. The fax attached to plaintiff's complaint is not specifically addressed to any person, which would normally be the case if consent to send it had been obtained. In short, the faxes have every indication of a "blast fax" sent without consent or an established business relationship.

In addition, AEP does not state why it "believed" its faxes did not require an opt out notice. There is nothing in the Petition to indicate that AEP read or relied on the Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), or Junk Fax Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006), prior to sending its junk faxes. There is also no

evidence that AEP, or anyone else that sent the faxes misunderstood anything about their obligation to include an opt-out notice. There is no opt out notice of any kind on the junk faxes attached to plaintiff's complaint. "We emphasize, however, that simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver." (FCC 14-164, at ¶ 26)

The Junk Fax Order requires that fax advertisements sent to recipients that provided prior express invitation or permission must include an opt out notice. 47 C.F.R. § 64.1200(a)(4)(iv); *see* Junk Fax Order, 21 FCC Rcd at 3812, para. 48; *See* Petition, pp. 2-3. Petitioners may apply for a retroactive waiver "of the Commission's rules requiring an opt-out notice on fax ads sent with the prior express permission of the recipient...." *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipients's prior Express Permission*, CG Docket No. 02-278, 05-338, Order, FCC 14-164, ¶ 22 (Oct. 30, 2014) (emphasis added). Importantly, AEP does not contend in its petition that its facsimiles were advertisements.

AEP's request for consideration of its untimely Petition should be denied. (Petition, p. 4, n. 1) The FCC permitted parties to petition for a retroactive waiver of the opt out notice requirement from October 30, 2014 to April 30, 2015. AEP was served with Plaintiff's complaint on May 1, 2015, and its Petition was filed on May 7, 2015.

Finally, AEP does not give any indication of the number of junk faxes it sent, and as stated above, it has not yet filed a responsive pleading to Plaintiff's complaint. Instead, AEP argues that it "potentially could be subjected to substantial statutory damages". (Petition, p. 6) AEP is a subsidiary of American Electric Power Company, Inc., which is a public company. American Electric Power Company, Inc.'s 10-K statement is available electronically on its

website, www.aep.com, along with its first quarter of 2015 earnings of \$629 million. It is unlikely that any judgment entered against AEP in this case would drain its resources.

On this record, no action by the Commission is warranted. There are no special circumstances to warrant a deviation from the general rule and a waiver would not serve the public interest. AEP's petition should be stricken and/or denied. The petition is nothing more than a baseless attempt to complicate an enforcement action by the recipient of unsolicited advertising faxes.

Respectfully submitted,

s/ Daniel A. Edelman
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APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

WHOLESALE POINT, INC.,)	
on behalf of plaintiff and)	
the class members defined herein,)	
)	
Plaintiff,)	15 C 3845
)	
v)	Judge Lefkow
)	Magistrate Judge Cox
AEP ENERGY, INC.,)	
and JOHN DOES 1-10,)	
)	
Defendants.)	


AFFIDAVIT OF KAMAL HADDAD

Kamal Haddad, on behalf of Wholesale Point, Inc., declares under penalty of perjury, as provided for by 28 U.S.C. §1746, that the following statements are true:

1. I have personal knowledge of the facts contained herein.
2. I am the Administrator of Wholesale Point, Inc.
3. Wholesale Point, Inc. is the plaintiff in the above-captioned lawsuit.
4. On July 13, 2012, plaintiff Wholesale Point, Inc. received the unsolicited fax advertisement attached as Exhibit A on its facsimile machine from defendant AEP Energy, Inc.
5. Wholesale Point, Inc. has never done business with defendant AEP Energy, Inc.
6. Wholesale Point, Inc. did not consent to receiving advertising facsimiles from defendant AEP Energy, Inc.

7. Pursuant to 47 U.S.C. § 227 (b)(3), Wholesale Point, Inc. is entitled to receive \$1,500 in statutory damages for each unsolicited facsimile advertisement that was sent to it by defendant AEP Energy, Inc.

Executed at Willowbrook, Illinois, on 6/11, 2015


Kamal Haddad, on behalf of
Wholesale Point, Inc.

Subscribed and sworn before me

this 11th day of June, 2015




Notary Public

Executed on June 11, 2015

EXHIBIT A

AMERICAN ELECTRIC POWER

TO: CURRENT COMED CUSTOMER
FROM: TALOHR/ WITH AEP ENERGY X 267
SUBJECT: RATE REDUCTION ON COMED BILL
DATE: 7/13/2012

Good afternoon,

I spoke with you this morning in regards to lowering your rate on your COMED electricity bill.

Your ComEd account qualifies for a rate reduction only **6.55 cents per kwh**. AEP energy is a Chicago based electric supplier with an A+ rating with the Better Business Bureau. We are located in the downtown Chicago area and have been in business for OVER 100 years. We are a very reputable and competitive company and would like to apply the low rate to your next ComEd meter read. This low rate also includes your transmission service charge as well as your purchased electricity adjustment charge. ALL INCLUSIVE RATES. Your Company does have the potential to save money annually which is always a plus for your business. I look forward to speaking with you in regards to a rate deduction for your ComEd acct and getting you started on your savings.

Thank You,

Talohr Ram

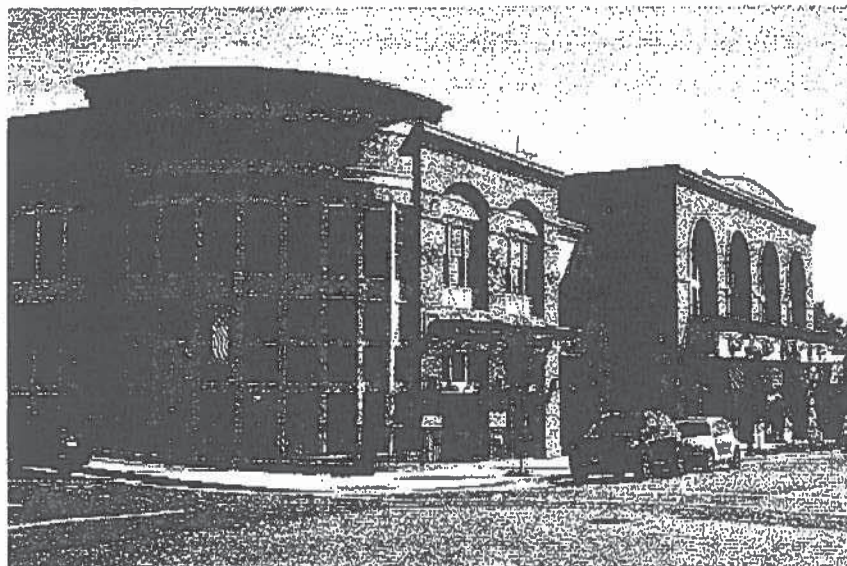
AMERICAN ELECTRIC POWER Energy Solutions

Office:832-518-4868 x 267

Save Money on Electricity with AEP Energy

Did you know that you can choose your electricity supplier and save up to 13%?

AEP Energy can turn your monthly electric bill into a competitive advantage by lowering your business expense.



Sign up now for up to a
13% discount off
the current ComEd supply rate with
an AEP Energy fixed rate of 6.55
cents per kwh and 24-month term.

Call us for more information:
832-518-4868 X 267

TALOH

Changing to AEP Energy could
not be easier:

- No switching fees
- No visit to your business required
- No interruption in power delivery
- Continue to receive one consolidated bill from ComEd
- Same reliable delivery and repair services from ComEd

Energy Deregulation and Customer Choice

Before energy deregulation, local utilities controlled all three components of your service: generation (supply), transmission and distribution. With deregulation, state legislatures and public utility commissions created competition by separating the supply portion of your energy bill from delivery. Now retail energy companies compete to be your supplier. And, consumers benefit from innovative rate structures and cost savings.

How can AEP Energy offer lower supply rates?

Because local utilities no longer generate energy, they buy from the wholesale marketplace like AEP Energy does. Because AEP Energy purchases energy on a daily basis, our market intelligence and buying strategies allow us to offer you lower, more competitive rates.

Your Local Utility

Your local utility still delivers electricity to your location and is who you call in case of an outage or emergency. They also continue to maintain and repair power lines, meters and other equipment.

You will continue to receive one bill from, and remit monthly payments to, your local utility. The only change you will notice on your bill each month will be your new AEP Energy electricity supply rate.

About AEP Energy | AEP Energy makes it easy for customers to buy, manage and use energy. A competitive supplier of power since 2004, we have more than 100,000 customers. Nationally, AEP Energy provides solutions to increase efficiency and take control of costs.

A subsidiary of American Electric Power, AEP Energy combines an individualized, consultative approach with the resources of a Fortune 200 company. We define success by what makes our customers successful.

AEP Energy is a competitive retail electric service provider affiliated with American Electric Power, Inc. AEP Energy is not soliciting on behalf of and is not an agent for any AEP Utility.

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